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Reforming family property – comparisons, compromises and common dimensions

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This article examines family property policy in several Commonwealth jurisdictions. The article compares both 'family' and 'property' dimensions of policies adopted in each jurisdiction, and argues that a common feature of each policy is the compromise which is made between wide applicability and deep proprietary effect.

INTRODUCTION

The reform of family property law is becoming an old chestnut. In July 2002, the Law Commission for England and Wales published a Discussion Paper on the property rights of home sharers (*Sharing Homes*).¹ but, after nine years of consideration, appeared to admit defeat. The Commission acknowledged that the current law, in relation to the property rights of home sharers, is inadequate. However, despite extensive consideration of possible alternative models, it concluded that: 'it is not possible to devise a statutory scheme for the determination of shares in the shared home which can operate fairly and evenly across all the diverse circumstances which are now to be encountered'.² Therefore, the Law Commission did not make recommendations, but merely suggested some possible future avenues for consideration. Ultimately, the Law Commission concluded that policy making in this area, particularly in relation to: 'defin[ing] a status which would lead to the vesting of rights and obligations' necessitates: 'answering very difficult questions of social policy which are essentially matters for Government'.³

The difficulties experienced by the Law Commission when attempting to find a 'solution' to the problems raised in the field of family property law are nothing new. It is increasingly clear that: '[a]lthough matrimonial property law reform seems an innocuous enough subject, in the end it involves consideration of some of our most deep-seated attitudes towards ownership of property and relationships within the family'.⁴ Furthermore, the family property policies adopted in particular jurisdictions are usually indicative of social attitudes towards both property issues and family relationships at the time of enactment. This is particularly evident in relation to evolving views on the definition of family and domestic relationships, which have influenced family property policies in jurisdictions such as Australia, Canada and New Zealand.⁵

This article argues that a common feature of family property policies, both within these islands and in the leading common law jurisdictions in the Commonwealth, is the trade-off which occurs between the interests of property law on the one hand, particularly in relation to rights of ownership and management and, on the other hand, the inclusive approaches advocated by modern family lawyers. Comparative analysis of the nature and scope of family property policies reveals the compromises made between these competing interests by legislators in each jurisdiction, in their efforts to strike an acceptable balance between the interests of property law and those of family policy.

¹ *Sharing Homes: A Discussion Paper* (Law Commission, 2002).

² *Ibid*, Executive Summary, at p iv.

³ *Ibid*, at para 15.

⁴ F. A. Schroeder, 'Matrimonial Property Law Reform: Evaluating the Alternatives' (1977) 11 *University of British Columbia Law Review* 24, at p 32.

⁵ See further p3 below under 'The Law Commission for England and Wales – *Sharing Homes*'.



This competition is particularly evident when the focus of family property policy is shifted from 'internal' disputes, such as reallocation of property between partners on divorce, separation, or death, to 'external' issues, which potentially affect dealings in family property involving third parties, for example, creditors. The dimensions of family property schemes, particularly the proprietary dimensions of such schemes, become highly relevant when considering the balance struck between claimant partners and third parties. This article will illustrate the common dimensions that emerge from a comparative analysis of how family property policies affect third parties. In jurisdictions where family property legislation has adopted a broad and inclusive definition of 'family', the nature of the property rights conferred against third parties has been shallow. Where, on the other hand, family property legislation has conferred deep and substantial protections against third parties, the category of claimants protected has tended to be narrow.⁶

THE DIMENSIONS OF FAMILY PROPERTY POLICY

Before proceeding to compare particular family property policies, it is useful to consider the various types of dimensions which might be brought under consideration in relation to each jurisdiction. First, this article will focus on the 'depth' of family property policies – that is, the nature and degree of the proprietary right conferred on 'family' members under particular policies, in relation to ownership and/or management of family property. It is suggested that family property policies can be regarded as either shallow – conferring little in the way of proprietary rights which can be exercised against third parties – or deep, conferring substantial proprietary rights and interests, which bind third parties *ab initio*. An example of a shallow system might be the current matrimonial home rights conferred under the Family Law Act 1996 in England and Wales, which confers rights of occupation, but not of ownership or management; furthermore, those rights of occupation are only binding against third parties when they have been registered. On the other hand, family property systems which provide for statutory co-ownership can be regarded as conferring a deep protection. Rights falling in between might include either the right to a share, or to apply for a discretionary division of 'family assets', which would take effect from the date of a court order, or management rights over the family home, for example, control over dispositions.

The second dimension discussed in this article is the 'width' of family property policies. 'Width' refers to the inclusiveness of family property policy. This dimension can be formulated in terms of either 'who do I have to be?' or 'what do I have to do?' in order to come within the remit of the scheme. In terms of status, the narrowest family property policies are limited to spouses, while the widest have embraced not only spouses and cohabitants (homosexual and heterosexual), but also parties to a domestic relationship. On the other hand, in terms of actions, the narrowest family property policies recognise only direct financial contributions to the acquisition of the property, while the widest take account of a range of conduct, including labour in the home and childcare.

The Law Commission's recent Discussion Paper on *Sharing Homes* started from the premise that a very wide definition should be adopted in relation to 'who do I have to be?'. The remit of the Commission's home sharing project included consideration of the property rights of all persons sharing homes, including spouses, cohabitants and those in non-sexual domestic relationships. By comparison, current family property policy in England and Wales adopts a narrow approach. Under the Family Law Act 1996, matrimonial home rights must be registered to bind third parties, and only spouses may register.⁷ This scheme is narrow in its applicability, and is also shallow in effect: as noted above, this legislation confers only rights of occupation, and these rights bind third parties only when registered. Furthermore, although English law protects co-owning occupiers in a relatively 'deep' way,⁸ this depends on the occupier

⁶ See also L. Fox, 'Creditors and the Family Home: Three Perspectives on Family Property Policy' (2002) 2 *Irish Journal of Family Law* 3, where a similar argument is raised.

⁷ Family Law Act 1996, s 31.

⁸ See Land Registration Act 1925, s 70(1)(g), and the decision in *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487.

establishing an ownership interest in the property, and the principles currently governing the law of implied trusts in England and Wales remain relatively narrow, since direct financial contribution is usually required.⁹

This analysis is brought into sharp relief by the recent experience of the Law Commission for England and Wales. In *Sharing Homes*, the Law Commission considered the property interests of a broad range of home sharers including not only spouses and cohabiting couples, but also: ‘friends, relatives and others who may be living together for reasons of companionship or care and support’.¹⁰ Although the task set for itself by the Commission was admirably inclusive, the Commission was unable to propose a solution which would be sufficiently flexible to meet the needs of such a wide category of home sharers. The Commission had developed a draft solution, but this was ultimately rejected on the basis that it could not be guaranteed that the scheme would: ‘operate fairly and evenly across the diverse circumstances which are now to be encountered’.¹¹

The analysis adopted in this article is, by its own definition, ‘two-dimensional’. Restraints on space, and the desire for simplicity preclude consideration of the further dimension of scope of property included, that is, whether policies are restricted to the family home, or whether other assets are included. This article analyses the comparative width and depth (as defined above) of family property policies in different jurisdictions, to argue that the lesson of experience is that the wider the category of claimants covered under family property regimes, the shallower the proprietary dimension of any protection conferred tends to be. This comparative analysis reveals the compromises that have been made in relation to these dimensions, by judicial and legislative policy makers in each jurisdiction, in their efforts to strike a balance between the interests of property law, and those of family policy.

From a social perspective, it would be unfortunate if the progressive and inclusive outlook adopted by the Law Commission regarding the rights of *all* persons who share homes were to be abandoned. This article concludes, therefore, by considering how the needs of a wide category of home sharers might be protected, without sacrificing the proprietary depth which gives teeth to family property regimes.

THE LAW COMMISSION FOR ENGLAND AND WALES – SHARING HOMES

It is useful, by way of setting the context for this discussion, to review briefly the current policy position of the Law Commission for England and Wales. In its recent Discussion Paper, *Sharing Homes*, the Law Commission reviewed the current law concerning the acquisition of interests in shared property,¹² and made a number of criticisms.¹³ According to the definitions adopted in this article, the family property scheme currently provided for under the Family Law Act 1996 can be described as both shallow (the rights conferred are rights of occupation only, and do not bind third parties without registration) and narrow (only spouses can register matrimonial home rights). On the other hand, the proprietary protection afforded by the acquisition of a co-ownership interest in the family home is deep, but under current implied

⁹ *Lloyd's Bank Ltd v Rosset* [1991] 1 AC 107; see, however, the decision in *Le Foe v Le Foe* [2001] 2 FLR 970, when Mostyn J suggested the adoption of a more flexible approach in relation to indirect financial contributions. The Law Commission has recently endorsed the suggestion that the English courts adopt a more flexible policy in relation to implied trusts, see further below under ‘The Law Commission for England and Wales – Sharing Homes’.

¹⁰ *Op cit.* n 1, Executive Summary, at para 1.

¹¹ *Ibid.*, at para 15.

¹² This section reviewed the means by which home sharers may acquire joint legal title, the creation of express trusts, and the principles for the acquisition of proprietary interests under the doctrines of implied trusts and proprietary estoppel.

¹³ The criticisms made included the ‘myth’ of common intention; recent uncertainty regarding the types of contributions which are acceptable as evidence of an implied common intention; see *Le Foe v Le Foe* [2001] 2 FLR 970; the argument that the current law discriminates against those who do not earn income from employment, current uncertainty regarding the quantification of beneficial interests under constructive trust principles; see *Mutland Bank Ltd v Cooke and Another* [1995] 2 FLR 915, *Drake v Whipp* [1996] 1 FLR 826; and the unpredictability of estoppel as a means of acquiring a beneficial interest in the family home.

trust principles, such an interest can only be acquired on the narrow basis of direct financial contributions.

Although the Law Commission recognised the limitations of the current law, the Commission did not ultimately profess to have resolved the issues raised by these criticisms. The Discussion Paper, therefore, went on to present the Commission's 'workings-out' to date. From these we can see, however, that the Law Commission was endeavouring to devise a family property system, which would be at once wide in its applicability and deep in proprietary effect.

The Law Commission had been considering the adoption of a property-based model for the acquisition of interests in the shared home.¹⁴ The Commission emphasised, however, that any statutory scheme proposed would apply only where the parties had made no express arrangements for property ownership *inter se*.¹⁵ The scheme under consideration would have been of very wide applicability, applying to *any* shared home, and excluding only 'commercial' occupiers such as lodgers, employees, tenants, and boarders. The Commission's property model would have enabled home sharers to acquire an interest in the home behind a statutory trust, based on contributions to the relationship,¹⁶ but employing a broad definition of 'qualifying contributions' which included direct and indirect financial contributions as well as 'homemaking and caring contributions'.¹⁷ Countervailing benefits, such as free accommodation in the shared home could be taken into consideration and off-set against the contributions. Finally, the interest acquired by a home sharer would arise at the time the contribution was made, and thus would be 'retrospective'. Crucially, this would have meant that the proprietary interests of third parties would have been affected, thus conferring a deep and substantive proprietary protection on a wide category of home sharers.

The Commission anticipated a number of problems with the scheme under consideration.¹⁸ Concerns raised regarding the property scheme included the suggestion that: '[t]his may in some cases confer disproportionate benefit on a person who has been sharing the home with the legal owner'.¹⁹ The Commission considered a number of 'worked examples', where the effect of the proposed scheme was illustrated, and concluded that the effects across a wide variety of fact situations could be unfair. It was noted that: 'in determining which person should be able to claim beneficial entitlement under the scheme, the nature of the relationship between the legal owner and the claimant would be impossible to disregard. Indeed, it is the nature of that relationship which would dictate the answer to the question'.²⁰ On the whole, the Law Commission concluded that, although the current system can operate unjustly, it was not able to develop a scheme based on property law principles which would be fairer than the current system: '[t]he property law scheme does not go far enough in remedying injustices

¹⁴ Op cit, n 1, Part III.

¹⁵ Furthermore, partners could not opt out of the property scheme, unless they had made alternative arrangements between themselves concerning their property ownership.

¹⁶ The Commission emphasised that home sharers would not get 'something for nothing', op cit, n 1, at para 3.22. A relevant contribution would be presumed to give rise to an interest in equity, but that presumption could be rebutted by evidence that the contributor intended to gift or lend the property or services contributed.

¹⁷ The Commission noted, however, that: '[t]his type of contribution raised difficult issues. It was essentially a contribution towards the household or the family and it was at best indirectly related to the acquisition of the property', *ibid.* at para 3.41. It was also noted that: 'Valuation of the contribution made (in money terms) was a potentially difficult, and, some might argue, demeaning process. Nevertheless, we did not feel that such services should be ignored merely because quantification may well be nigh impossible in absolute terms. Consistent with our overall approach, it was clear that the scheme should focus on the economic value of home-making or caring activities', *ibid.* at para 3.42.

¹⁸ It was suggested that, '[t]he uncompromising rejection of intention, central to the scheme, was ultimately impossible to justify. It may be possible to encourage parties into making express provision, but they cannot be compelled to do so', *ibid.* at para 3.76. The Commission was also concerned that the system it was proposing under the 'property approach' would: '[i]n effect ... impose a form of statutory co-ownership on those who fail to make express provision and thereby fall within its remit', *ibid.* at para 3.82.

¹⁹ *Ibid.*

²⁰ *Ibid.* at para 3.80.

which arise under the current law, but creates new ones of its own. It is not, therefore, one which we can even provisionally propose'.²¹

Part IV of the Discussion Paper retreated into a consideration of the potential for development of judicial principles, in order to enable the courts to achieve: 'greater clarity, greater fairness, and greater certainty'.²² The Commission considered the judicial development of common law principles in Australia, Canada and New Zealand. It was suggested that although: '[t]here is no doubt that the broader approach of these jurisdictions tends to lead to greater uncertainty and unpredictability than the current English law ... this may be a necessary consequence of fairness'.²³ It was also noted, however, that the Commonwealth jurisdictions adopt a two-tier approach, supplementing their common law principles with *de facto* relationship legislation. The Commission acknowledged that the development of judicial principles cannot be expected to solve all the problems that exist and that: '[i]t cannot be expected, in particular, to deal with the broader financial consequences of the breakdown of the relationship between those who have been living together in a shared home'.²⁴

Part V of the Law Commission's paper, therefore, considered the adoption of a 'relationship approach'. The Commission considered the current operation of ancillary relief between spouses, and the lack of adjustive discretion between unmarried couples. A distinction was highlighted between the court's power to reallocate the property of spouses, and the lack of discretion conferred in relation to cohabitants, particularly by comparison with the broader approach which has been adopted in relation to property reallocation on relationship breakdown under *de facto* legislation in many Australian states and in New Zealand.²⁵ The Commission concluded that although: 'there is a very strong case for singling marriage out as a status deserving of special treatment'²⁶ that: 'further consideration should be given to the adoption, necessarily by legislation, of new legal approaches to personal relationships outside marriage'.²⁷

It is unsurprising that the Law Commission failed to reach an ideal solution to the problems associated with family property. The Commission attempted to create a 'one-stop shop' model, which would enable fair results to be reached for an extremely wide category of home sharers. Furthermore, the Commission sought to provide a deep and substantial proprietary protection for home sharers, which would have conferred rights against third parties, since the home sharer's interest would have taken effect from the date of the contribution, rather than from the date of the court order. The Law Commission attempted to reform family property law without compromising on either the width of the family dimension, or the depth of the proprietary dimension. Comparisons with other jurisdictions indicate that this was, indeed, a tall order, and that the project set for itself by the Law Commission in *Sharing Homes* was, perhaps, a little too ambitious.

ALTERNATIVE APPROACHES I – WIDE BUT SHALLOW

This section will consider the wide but shallow approaches which have formed part of family property policy in the leading Commonwealth jurisdictions of Canada, Australia and New Zealand. From a family law point of view, these jurisdictions have led the way in developing broader and more inclusive definitions of concepts such as 'family', 'spouse', 'qualifying cohabitant' or 'domestic relationship' than those adopted by family property policy makers within these islands. It is noteworthy, however, that the degree of proprietary protection conferred under statutory and common law schemes which have adopted a wide remit has tended to be shallow.

²¹ Op cit, n 1, at para 3.100.

²² Ibid, at para 2.114.

²³ Ibid, at para 4.23.

²⁴ Ibid, at para 5.2.

²⁵ These systems are considered further below.

²⁶ Op cit, n 1, at para 5.42.

²⁷ Ibid, Part VI, at para 7.

Canada

In Canada, matrimonial property is governed by a two-tier system. The first tier consists of the *de facto* relationship legislation, which varies from province to province, but for the most part addresses family property issues arising in the contexts of relationship breakdown and death. In most provinces,²⁸ the *de facto* relationship legislation provides for the division of family property between partners in variously defined relationships. This is in line with recommendations made by the Federal Law Commission of Canada in 1975.²⁹ The Canadian Commission had considered a number of possible models,³⁰ but favoured deferred community as the best compromise: 'allowing minimal change and leaving creditor's rights unaffected during the marriage'.³¹ Although the Canadian Federal Law Commission recommended that deferred community property should be implemented at the federal level, the Commission's proposals were never enacted. The delivery of *de facto* relationship legislation was, therefore, left to individual provinces and territories.

DE FACTO LEGISLATION

The statutory schemes which have been adopted in the Canadian provinces and territories have tended to proceed along the lines of a deferred division of family property. Property interests are not reallocated during marriage, but only when one partner applies to the court for a division of assets, for example, when the relationship ends or on the death of one partner.³² Partners do not acquire any proprietary interest in property during the currency of the relationship or, in fact, until an application is made after the relationship has ended, and claimants do not acquire any rights against third parties. The basic property dimensions of these systems have been broadly accepted.

Debate in Canada has tended to focus, instead, on the nature of the relationship to be recognised within the relevant provisions.³³ It is significant, however, that although the widening application of family property legislation in Canada addresses major issues in relation to the definition of 'family', the 'external' property consequences in relation to third parties are minimal. While a division of property between partners by court order may impact on the interests of unsecured creditors of one partner, since property remains separate prior to an application under the Acts, existing proprietary interests are unaffected. Furthermore, additional protection for third parties is provided by statutory provisions stating that when making an order under one of these schemes, the court shall take account of any third party interests which could be affected when making an order. The court may also have power to direct that any third party who may be an 'interested person' be served with notice of the application, so that their interests are taken into account when the court is making an order.³⁴ The dimensions of the *de facto* legislation in Canada can, therefore, be described as wide (or widening) in terms of applicability, but shallow in the degree of proprietary protection conferred, particularly against third parties.

²⁸ With the exception of Newfoundland, considered further below, see nn 103-104 and associated text.

²⁹ *Family Property*, Working Paper No 8 (Federal Law Commission, 1975); see also, *op cit*, n 4.

³⁰ Including a discretionary model, and community of property with joint management.

³¹ P. N. Parkinson, 'Who needs the Uniform Marital Property Act?' (1987) 55 *University of Cincinnati Law Review* 677, at p 689.

³² Family Law Act 1986 (Ontario); Family Relations Act 1996 (British Columbia); Matrimonial Property Act 1980 (Alberta); Matrimonial Property Act 1997 (Saskatchewan); Marital Property Act 1987 (Manitoba); Marital Property Act 1980 (New Brunswick); Matrimonial Property Act 1989 (Nova Scotia); Family Law Act 1995 (Prince Edward Island); and Matrimonial Property Act 1969 (Quebec).

³³ The Canadian Supreme Court has widened the applicability of family property provisions in a number of cases on the basis of the equality obligation imposed by s 15 of the Canadian Charter of Rights and Freedoms; see for example, *Miron v Trudel* [1995] 2 SCR 418; *M v H* (1996) 40 CRR (2d) 240; *Watch v Watch* (1999) 67 CRR (2d) 311; and *Walsh v Bona* (2000) ACWS (3d) 287.

³⁴ See, for example, Matrimonial Property Act 1997 (Saskatchewan), s 45.

GENERAL TRUST PRINCIPLES – UNJUST ENRICHMENT

The application of general trust principles, particularly the development of the doctrine of unjust enrichment to enable non-owning partners to acquire interests in family property in Canada,³⁵ has attracted a great deal of academic attention.³⁶ This doctrine has enabled the Canadian courts to take various types of contributions, including labour in the home and childcare,³⁷ into account when determining whether one partner has been unjustly enriched at the expense of another. Although the types of contributions taken into account under this doctrine are wide, the degree of proprietary protection conferred on the claimants against third parties is shallow.

The Canadian implied trust is a remedial device, and as such, the Canadian courts have adopted a flexible and discretionary remedial jurisdiction regarding the question of *what* remedy should be granted in any particular case and, to a certain extent, as to *when* the trust arises. Although a proprietary interest under a constructive trust is one possible result following a finding of unjust enrichment, it is not an inevitable consequence of such a finding.³⁸ If the court does decide that a monetary award would be inadequate, and that a proprietary remedy is appropriate,³⁹ a further issue will concern *when* that interest should be treated as arising. If the proprietary interest acquired by the claimant comes into existence only when declared by the court, then it will not affect the interests of existing third party purchasers and secured creditors, who will have priority over the newly-acquired interest. If, however, the constructive trust is held to have come into existence whenever the owning partner was unjustly enriched at the expense of the claimant, then that proprietary interest may take priority over existing third party interests.

The law on this subject appeared to be well-established prior to the decision of the Supreme Court in *Rawluk v Rawluk*.⁴⁰ Prior to *Rawluk*, it was generally accepted that since the remedial constructive trust: 'acts merely as a remedy for an independent cause of action; it constitutes a judicial response to a triggering event, rather than a triggering event in itself'⁴¹ it did not come into existence until awarded by the court. In *Rawluk v Rawluk*, however, McLachlin J held that the remedial constructive trust granted by the court could be of retrospective effect, and

³⁵ See, for example, *Rawluk v Rawluk* (1987) 61 OR (2d) 637; *Pettus v Becker* (1980) 117 DLR (3d) 257; *Sorochan v Sorochan* (1986) 29 DLR (4th) 1; and *Peter v Beblow* [1993] 1 SCR 980. Although the doctrine of unjust enrichment is not confined to family property cases, it has been suggested that the willingness of the Canadian courts to find that the elements of unjust enrichment are present in facts involving sexual partners ensures the claimant in such a scenario: 'a very strong likelihood of success'. See J. Mee, *The Property Rights of Cohabitees* (Hart Publishing, 1999), at p 194.

³⁶ On the operation of the Canadian doctrine, see generally, L. I. Rotman, 'Deconstructing the Constructive Trust' (1999) 37 *Alberta Law Review* 133; M. McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (1999) 37 *Alberta Law Review* 1; F. Belzil, 'The Constructive Trust in Insolvency' (2001) 16 *National Creditor Debtor Review* 8; J. P. F. Bodgen, 'On the "Agreement Most Foul": A Reconsideration of the Doctrine of Unconscionability' (1997) 25 *Manitoba Law Journal* 187; M. McInnes, 'Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada' (1998) 25 *Manitoba Law Journal* 513; and R. Chambers, 'Constructive Trusts in Canada' (1999) 37 *Alberta Law Review* 173.

³⁷ In *Peter v Beblow*, op cit, n 35, McLachlin J held that: 'The notion that household and child care services are not worthy of recognition by the court fails to recognise the fact that these services are of great value, not only to the family, but to the other spouse'. In *Wong v Wong* (1999) 88 ACWS (3d) 1029, at para 54, the court noted that: '[i]ncreasingly, the work of a woman in the management of the home and rearing of the children, as wife and mother, is recognised as an economic contribution to the family unit'. See also the recent decision in *Wicks v Nelson Estate* (2001) 102 ACWS (3d) 821, when the court awarded a proprietary estate to the plaintiff following the death of his partner. The plaintiff's: 'main contribution was in the area of companionship and caregiving'. Ibid, at para 18, per Melvin J.

³⁸ 'A finding of unjust enrichment provides a gateway to the imposition of a constructive trust. It does not automatically open the gate, however. The process is two-staged. If an unjust enrichment has occurred the next step is to determine whether the imposition of a constructive trust is an appropriate remedy in the circumstances'. F. Belzil, op cit, n 36, at p 14.

³⁹ For example, because there is a substantial link between the contribution and the acquisition, preservation, maintenance or improvement of a property.

⁴⁰ Op cit, n 35.

⁴¹ M. McInnes, op cit, n 36, at p 524.

acknowledged that: 'property rights which third parties have acquired in the interval may be adversely affected'.

Adopting the *Rawluk* approach, however, did not necessarily involve subjugating the claims of third parties to the proprietary interest awarded to the claimant. Since the court's jurisdiction to award a remedy is discretionary, it was suggested that the court could mould the remedy awarded in any given case:

'to avoid prejudice to an innocent purchaser. For example, a judge may limit the retrospective operation of a decree of constructive trust, to protect a *bona fide* purchaser for value without notice ... [t]he protection of an intervening interest would be a circumstance requiring a judge to limit the retrospective effect of, or perhaps refuse, the declaration of remedial constructive trust.'⁴²

The prevailing approach towards the implications of constructive trusts on third parties appears to be a retreat into arguments concerning the discretionary nature of the trust. Regardless, it is clear that the proprietary effect of the trust against third parties is shallow. Whether the trust was capable of being regarded as retrospective or not, it was apparent that the interests of third parties would be taken into account in any particular case, and that the claimant's rights would not be allowed to take priority over an existing third party's interest.⁴³

It has been suggested that McLachlin J's judgment on behalf of the majority of the Supreme Court in *Soulos v Korkontzilas*:⁴⁴

'stressed the need to consider the effects of constructive trusts on third parties, such as creditors, before imposing them on a particular situation ... Her statement that constructive trusts should not be imposed without first considering the creation of injustices done to third parties ought to be regarded as a practice directive towards other judges faced with decisions as to whether to award constructive trusts in particular circumstances.'⁴⁵

This could include taking account of the interests of unsecured creditors, whose claims may be prejudiced by any proprietary remedy, regardless of whether the interest awarded is retrospective.⁴⁶ The courts can, therefore, adapt the dimensions of any interest conferred, in order to ensure that third parties are not adversely affected by any order granted to the claimant. The proprietary depth of any interest conferred on the basis of the doctrine of unjust enrichment is, therefore, limited by the protection of existing third party rights.

⁴² A. F. Sheppard, 'Rawluk v Rawluk: What are the limits of the remedial constructive trust?' [1990] 9 *Canadian Journal of Family Law* 152, at pp 165–166.

⁴³ 'Since the awarding of a constructive trust is discretionary, it may properly be modified to fit the specific needs of individual situations. It is therefore incorrect to say either that constructive trusts always take effect from the time of declaration or that they are necessarily retrospective in their application. Courts, in exercising their discretion over the imposition of constructive trusts, must account for the circumstances in which the constructive trust would exist, taking care to ensure that the interests of third parties are not unduly subordinated to those of the parties to the litigation. In paying particular attention to these circumstances, the courts may order that a constructive trust take effect from the time of declaration, when the property in question came into the possession of the defendant, or at any time in between', L. I. Rotman, *op cit*, n 36, at pp 164–165.

⁴⁴ (1997) 146 DLR (4th) 214.

⁴⁵ L. I. Rotman, *op cit*, n 36, at p 170.

⁴⁶ 'The remedial constructive trust will have the effect of giving the constructive trust beneficiary a priority over the unpaid general creditors of the constructive trustee with respect to the trust property. This is because its effect is to recognise the plaintiff as the beneficial owner of the property, thereby removing it from the constructive trustee's estate, and hence from the reach of his creditors. If the trust property is used by the constructive trustee for the payment of his debts before the beneficiary can realise upon it, however, the beneficiary's interest may be defeated ... Thus, where a constructive trustee is insolvent, a declaration of constructive trust turns the unpaid general creditors of the constructive trustee into the real losers', D. M. Paciocco, 'The remedial constructive trust: a principled basis for priorities over creditors' (1989) *Canadian Bar Review* 315, at pp 321–322.

Australia – de facto relationship legislation

In Australia, the Family Law Act 1975 (Commonwealth) and the *de facto* relationships legislation in some states and territories enable the courts to alter property interests on divorce or separation. The Family Law Act 1975 enables courts throughout Australia to reallocate property interests between spouses at the end of the relationship. It is narrow in scope, however, applying only to spouses. The *de facto* legislation which has been passed in some states and territories confers a wider power on the courts in those jurisdictions to regulate the property interests of persons falling within other defined relationships, generally after a prescribed period of time has passed. Both commonwealth and state legislation are limited to circumstances of separation and death, and do not affect third party interests.⁴⁷ Non-qualifying relationships in each state⁴⁸ are governed by general principles of property law, which are considered under 'General trust principles in Australia', below.

Six Australian states and territories (New South Wales, Northern Territory, Australian Capital Territory, South Australia, Victoria and Queensland) currently have legislation regulating family property. The dimensions of *de facto* legislation in Australia are similar to those of the schemes adopted in Canada.⁴⁹ The Australian *de facto* systems also tend towards a wide remit, but again the degree of proprietary protection against third parties is shallow.

The tendency of Australian state and territorial legislatures towards wide but shallow approaches may be derived, in part, from the recommendations of the Australian Law Reform Commission, which stated that:

'generally speaking, the law should not inhibit the formation of family relationships and should recognise as valid the relationships people choose for themselves. Further, the law should support and protect those relationships. However, the law should restrict a person's choice to the extent that it is necessary to protect the fundamental rights and freedoms of others and should not support relationships in which the fundamental rights and freedoms of others are violated. Instead it should intervene to protect them.'⁵⁰

In the context of family property policy, the rights and freedoms of others often refers to third party interests. Under the Australian *de facto* legislation, it is clear that although some jurisdictions (New South Wales, Australian Capital Territory, Queensland) have adopted broad definitions of the family unit, the proprietary protection conferred is shallow. Third party interests take priority over any rights acquired by the claimant.

New South Wales was the first state to adopt *de facto* legislation in 1984, and the current New South Wales provisions adopt the broadest definition of *de facto* relationships in Australia. The interests of home sharers in New South Wales are governed by the De Facto Relationships Act 1984, as amended by the Property (Relationships) Legislation Amendment Act 1999 to become the Property (Relationships) Act 1984. The original Act conferred rights on spouses and heterosexual cohabitants who had lived together for more than two years.⁵¹ Following the 1999 amendments, the New South Wales legislation encompasses a much broader category of relationships, including homosexual couples, and close, non-sexual 'domestic relationships'.

The New South Wales legislation does not, however, confer automatic property entitlements on qualifying parties. Parties to 'domestic relationships' (which includes *de facto* couples, and

⁴⁷ Section 79 of the Family Law Act 1975 conferred a general discretion on judges of the Family Court of Australia to alter the interests of spouses in their matrimonial property, but this discretion does not affect the antecedent interests of third parties, since: '[r]ights arising under section 79 come into existence when an order is made under that section'. In *Re Chemtse; Federal Commissioner of Taxation (Intervener)* (1990) 13 Fam LR 724; as P. Parkinson has noted: '[h]owever meritorious the claims of a spouse, his or her section 79 claim is effectively postponed to the rights of unsecured third party creditors'. 'Property Rights and Third Party Creditors – The Scope and Limitations of Equitable Doctrines' (1997) 11 *Australian Journal of Family Law* 15.

⁴⁸ Including all non-spouses in states which have not adopted *de facto* legislation.

⁴⁹ Discussed above

⁵⁰ *Multiculturalism and Family Law*, Discussion Paper No 47 (Australian Law Reform Committee, 1991), at para 4.

⁵¹ See De Facto Relationships Act 1984, s 4

also parties to a: 'close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care')⁵² have a right to make an application to the court for the adjustment of property interests.⁵³ Section 14 states that: 'a party to a domestic relationship may apply to a court for an order ... for the adjustment of interests with respect to the property of the parties to the relationship or either of them or for the granting of maintenance, or both'. The court has discretion to reallocate property interests between partners on such an application. As with the provincial legislation in Canada, the primary function is to resolve property issues *between partners* on separation. The legislation does not confer rights on partners *ab initio*, but requires an application to be made to the court for the conferral of an order.

The New South Wales legislation enables the court to redistribute property ownership between qualifying parties *inter se*, but the proprietary effects against purchasers or secured creditors are shallow. Although the legislation confers wide ranging powers on the court to grant whatever order is considered necessary to do justice within the broad class of 'domestic relationships', the power of the court to reallocate property rights is restricted to an 'internal' arrangement between the parties. Prior third party interests are not affected by any order granted by the court. Section 43 states that: 'In the exercise of its powers under this Part, a court shall have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested'. The use of the imperative 'shall' emphasises the obligation on the court to ensure that third party interests are not prejudiced by orders under this Act.⁵⁴

The provisions adopted in other Australian states have tended to follow the broad model of the New South Wales approach, that is, empowering the court to award deferred property interests, following an application by the claimant partner on separation or death.⁵⁵ The Australian state and territorial legislatures also provide that the court is to have regard to the interests of third parties, and should ensure that any order made protects the interests of *bona fide* purchasers or 'other interested persons'.⁵⁶ Some state and territorial legislatures have embraced relatively broad definitions of qualifying relationships. It is suggested, however, that so far as the proprietary protection conferred on partners *during the relationship* is concerned, particularly the ability of a claimant to acquire an interest which could take priority over third party claims, the *de facto* legislation provides a shallow protection.⁵⁷ Similarly to the Canadian legislation, Australian *de facto* legislation can thus be broadly described as wide (or widening) in scope, but shallow in relation to the degree of proprietary protection against third parties.

New Zealand – Matrimonial Property Act 1976

Family property in New Zealand is currently protected under two separate statutory systems, the Joint Family Homes Act 1964,⁵⁸ and the Matrimonial Property Act 1976. The scope and the degree of protection conferred by these concurrent regimes are quite distinct. The Joint Family Homes Act 1964 provides a substantive protection for spouses only, but depends on registration of the property as a joint family home. These provisions, which are not wide and shallow, but narrow and deep, are discussed further under 'Alternative approaches II – narrow

⁵² Property (Relationships) Act 1984, s 5(1)(b). The domestic support and personal care must not be provided for a fee or reward, or on behalf of another person or organisation, s 5(2).

⁵³ De Facto Relationships Act 1984, s 14(1).

⁵⁴ A 'person interested' could include both secured and unsecured creditors of one partner.

⁵⁵ Property Law Act 1958, as amended by the Property Law (Amendment) Act 1998 (Victoria); De Facto Relationships Act 1991 (Northern Territory); Domestic Relationships Act 1994 (Australian Capital Territory); De Facto Relationships Act 1996 (South Australia); and Property Law Act 1974, as amended by the Property Law Amendment Act 1999 (Queensland).

⁵⁶ Property (Relationships) Act 1984 (New South Wales), s 43; Property Law Act 1958 (Victoria), s 296; De Facto Relationships Act 1991 (Northern Territory), s 42; Domestic Relationships Act 1994 (Australian Capital Territory), s 30; and De Facto Relationships Act 1996 (South Australia), s 15.

⁵⁷ The operation of general trust principles in Australia is considered further, below.

⁵⁸ The 1964 Act amended and re-enacted the original Joint Family Homes Act 1950.

but deep', below. The Matrimonial Property Act 1976 provides an alternative layer of provisions which, although wide, is much shallower than the joint family homes regime in its protection against third party creditors. This second layer, which confers a lesser degree of immunity against the claims of creditors but without the need for registration, was extended to heterosexual and homosexual cohabitants under the Property (Relationships) Amendment Act 2001.

Although the joint family homes legislation provided a deep proprietary protection for spouses who had registered their properties, the principal role of the Matrimonial Property legislation was: 'to provide for the division of property on break-up of marriage by crystallising rights under the statutory matrimonial property regime'⁵⁹ when the marriage ended. Although the Joint Family Homes Act 1964 provided greater protection against creditors, the Matrimonial Property Act 1976 provided for equal division of family property on divorce.⁶⁰ At this stage, the court could make an order recognising the individual interests of each party.⁶¹ Since the matrimonial property legislation was extended to include heterosexual and homosexual cohabitants under the Property (Relationships) Amendment Act 2001, it has assumed even broader applicability. The provisions of the matrimonial property regime do not depend on registration. All spouses are protected by virtue of the marriage relationship,⁶² and since 1 February 2002, heterosexual and homosexual cohabitants are automatically included within the provisions also.

Although the scope of this scheme is now wide, the suspension of co-ownership rights under the Matrimonial Property Act 1976 until the stage of litigation has significant consequences in relation to third party creditors. The policy of the 1976 Act *vis-à-vis* creditors was illustrated by the observation that: 'the Bill does not in any way affect the rights of the secured creditors of either husband or wife. Their position will be exactly the same as it is now'.⁶³ This suggests that the proprietary aspects of the matrimonial property scheme are shallow. It is noteworthy, however, that although secured creditors are not affected by the New Zealand model of deferred co-ownership, section 20 does confer a limited protection on non-transacting spouses *vis-à-vis* third parties. Section 20 of the matrimonial property legislation confers a 'protected interest' on non-debtor partners, which exempts their prospective share of the property, up to a certain sum, against the *unsecured* liabilities of the other partner.⁶⁴ Although the legislature described the 'protected interest' as: 'a most significant piece of social legislation in its own right, giving as it does a modest degree of protection and security for the family and the family home'⁶⁵ it is important to bear in mind that with a *limited* protection against *unsecured* creditors only, the matrimonial property regime remains relatively shallow, so far as proprietary interests against third parties are concerned.

On the one hand, the enactment of the Property (Relationships) Amendment Act 2001 signals a significant widening in the scope of family property policy in New Zealand, as the matrimonial property regime is extended to include '*de facto* couples' and same-sex

⁵⁹ R. L. Fisher, *Matrimonial Property* (Butterworths, 2nd edn, 1984), at para 7.1. In contrast: 'the [Joint Family Homes Act] is concerned with amicable marriage and the period of conventional property rights', *op cit*, n 58.

⁶⁰ Matrimonial Property Act 1976, s 11.

⁶¹ To this end, the model of statutory co-ownership adopted in New Zealand differs from the versions proposed in the Irish 1993 Matrimonial Homes Bill, in the English 1980 Matrimonial Homes (Co-ownership) Bill, and the Northern Irish proposals for statutory co-ownership (Law Reform Advisory Committee (Northern Ireland), *Matrimonial Property*, Final Report (LRAC (NI) No 8, 2002)), all of which anticipated that co-ownership would be triggered during the subsistence of the marriage, either automatically, by registration, or by execution of a conveyance of property, respectively.

⁶² Although provision for *de facto* couples was initially included in the 1975 Bill, this was subsequently dropped. It is interesting to note, however, that since the Matrimonial Property Act 1976 protects their interests in the context of divorce, many spouses rely on the automatic protection of the 1976 Act, rather than registering their properties as joint family homes, see further under 'New Zealand – Matrimonial Property Act 1976', above.

⁶³ 408 *New Zealand Parliamentary Debate* 7 December 1976, at p 4567, the Hon David Thomson.

⁶⁴ 'The protected interest exists solely for the benefit of the non-owner spouse. The owner spouse's interest remains subject to the normal rights of creditors', R. L. Fisher, *op cit*, n 59, at para 173.

⁶⁵ *Op cit*, n 63.

cohabitants.⁶⁶ The principal benefits for such parties will arise in circumstances of relationship breakdown and death.⁶⁷ Although the limited protection available against creditors under the 1976 Act is also extended to cohabitants, with each partner acquiring a 'protected interest' in the property, this shields the non-debtor partner, to a limited extent, from the unsecured personal debts of the other partner only.⁶⁸ The protection offered against creditors under this scheme, although widely applicable, is shallow in comparison with that which is available to spouses under the Joint Family Homes Act 1964.⁶⁹ The deeper, more substantial protection against creditors, which can only be acquired by registration of the property as a 'joint family home', remains available on much narrower grounds, since only spouses can register their properties under this scheme.

ALTERNATIVE APPROACHES II – NARROW BUT DEEP

The policies considered above – the *de facto* legislation in Canada and Australia, the development of unjust enrichment in Canada, and the matrimonial property regime in New Zealand – have all tended towards the common dimensions of wide applicability but shallow proprietary protection. Other schemes within the Commonwealth, and particularly within these islands, have taken the opposite approach, and provide family property systems which are narrow in scope, but provide a deep protection against dealings with third parties. Policies with narrow but deep dimensions can be found in Ireland and Scotland. The joint family homes scheme in New Zealand is also narrow but deep, as are the homestead-type provisions of some Canadian provinces, and the general trust principles developed in Australia.

Ireland

In Ireland, the Family Home Protection Act 1976 provides a deep protection for spouses against transactions involving third parties without their consent. The Irish legislation confers a homestead-type protection, which is designed to protect the family home against dispositions by one spouse without the consent of the other. The essence of the Act is that: '[w]here a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2), (3) and (8) and section 4, the purported conveyance shall be void'.⁷⁰ When a property is used as a family home, any conveyance⁷¹ of the property requires the consent of the spouse of the party creating the conveyance. This effectively gives the spouse a right of veto over the transaction. If the consent of the spouse is not obtained, the transaction will be void. It is, therefore, in the purchaser's interest to ensure that a valid consent is acquired to ensure the validity of the transaction.

The consent requirement imposed by the Family Home Protection Act 1976 is not absolute, but subject to exceptions,⁷² including section 3(3), which provides that: 'no conveyance shall

⁶⁶ In the case of *de facto* relationships, the Act usually applies when the *de facto* partners have lived together for at least three years, although it may apply to shorter relationships in certain circumstances, Property (Relationships) Amendment Act 2001, ss 2C and 2D.

⁶⁷ The Attorney-General, M. Wilson, has stated that the: 'main focus of the new legislation ... is to provide protections and guidance on the fair division of property upon the breakdown of a relationship', speech made on 4 September 2000.

⁶⁸ This amount remains at \$82,000, Property (Relationships) Amendment Act 2001, s 53A.

⁶⁹ See 'Alternative approaches I – wide but shallow', at p 5 above.

⁷⁰ Family Home Protection Act 1976, s 3(1). 'Family home' is defined in s 2 as: 'primarily, a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving'.

⁷¹ 'Conveyance' is defined as including: 'a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property otherwise than by a will or a *donatio mortis causa* and also includes an enforceable agreement ... to make any such conveyance, and "convey" shall be construed accordingly', Family Home Protection Act 1976, s 1(1). Section 1(1) also provides that 'mortgage' includes an equitable mortgage, a charge on registered land and a chattel mortgage.

⁷² For example, where the conveyance is in favour of the other spouse, s 3(1); and where the contract for sale is entered into prior to the marriage, s 3(2).

be void ... (a) if it is made to a purchaser for full value'.⁷³ The protection of the bona fide purchaser as an exception to the consent requirement was intended to avoid the difficulties which could result if purchasers had to endure a 'cloud of uncertainty' over their title.⁷⁴ A facility for registration by a non-owning spouse was also included in the Act, so that a spouse could register the family home, protecting it against even the *bona fide* purchaser.⁷⁵ It was emphasised, however, that the registration provisions were intended only to supplement the veto conferred by virtue of the consent requirement.⁷⁶

The legislative policy of the Family Home Protection Act 1976 was motivated by the principles set out in Article 41 of the Irish Constitution, which enshrines the protection of the family.⁷⁷ The concept of family in the Irish Constitution is narrow, however, and explicitly gendered. The Irish Constitution values the home as the seat of the family,⁷⁸ and states that: 'by her life within the home, woman gives to the State a support without which the common good cannot be achieved'.⁷⁹ The Bill was intended to: 'provid[e] machinery to make certain that the principles, in some limited way, in respect of family property and the family home are protected and safeguarded so far as we can do so as legislators in this House'.⁸⁰ This initiative necessarily curtailed the freedom of the transacting party to deal with his own land without the consent of the non-transacting spouse. The Irish legislature reasoned, however, that: 'when a man marries and has a family, in view of the responsibilities he has taken on automatically he forfeits ... some of his property rights under the Constitution. No man should be able to leave his wife and children without a home'.⁸¹

Although the legislature accepted the need to balance the protection of the home with the interests of third parties;⁸² on the one hand, the protection of spouses was described as 'probably socially desirable',⁸³ while on the other hand, the *Dail* recognised the difficulties

⁷³ Subsection (6) adds that 'purchaser' means: 'a grantee, lessee, assignee, mortgagee, chargeant or other person who in good faith acquires an estate or interest in property'.

⁷⁴ The Minister of Justice emphasised that this provision: 'gives protection to a bona fide purchaser for full value who proves that he has taken all reasonable steps and made all reasonable inquiries in regard to the purchase from a husband who turns out to have sold the home without the wife's consent', 291 *Dail Eireann Debates* (1976) May 25, col 58, Mr Cooney. The burden of proving that reasonable steps had been taken was placed on the purchaser. The Minister of Justice said that: 'Accordingly ... bona fide purchasers are protected under the Bill, but only where they have provided full value and can establish that they have taken all reasonable steps and made all reasonable inquiries in relation to the purchase. I would establish that the onus of establishing that this was so will be on the purchaser if the matter is challenged', *ibid*, col 59, Mr Cooney.

⁷⁵ 'By doing this she will ensure that the defence of a bona fide purchaser can never be sustained against her', 291 *Dail Eireann Debates* (1976) May 25, col 59, Mr Cooney.

⁷⁶ 'Registration in the Bill is proposed as a subsidiary support for an anxious wife who fears that her husband may try to sell the home behind her back. The primary protection is afforded by section 3 which requires the husband to obtain her consent as a general precondition of the validity of a sale', *ibid*, col 71, Mr Cooney.

⁷⁷ Article 41.1.1 provides that: 'The State recognises the Family as the natural primary and fundamental unit of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law'. While Art 41.1.2 states that: 'The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State'.

⁷⁸ Mr Andrews stated that: 'This Bill is about the protection of the wives and children in the final analysis', 291 *Dail Eireann Debates* (1976) May 25, col 76, Mr Andrews.

⁷⁹ *Bunreacht na hEireann* (The Constitution of Ireland), Art 41.2.1.

⁸⁰ 291 *Dail Eireann Debates* (1976) May 25, col 93, Mr Esmonde.

⁸¹ 291 *Dail Eireann Debates* (1976) May 25, cols 103–104, Mr Burke. Although the legislation was not limited in terms of gender, members of the *Dail* presumed that the husband would be the contracting party, and his wife, the consenting party.

⁸² 'We must ensure that this and other legislation does not discourage lessors or building societies from letting houses to married couples or couples proposing marriage, or providing the necessary capital by way of mortgage to provide a matrimonial home', 291 *Dail Eireann Debate* (1976) May 25, col 78, Mr Andrews.

⁸³ 291 *Dail Eireann Debates* (1976) May 25, col 85, Mr Andrews.

which a wholly spouse-orientated solution could create in relation to the availability of credit;⁸⁴ the Irish legislature came down on the side of providing a deep protection for the family home. It was suggested that creditors must simply accept that the home is a 'socially sensitive asset',⁸⁵ with the consequence that: '[t]hey must expect to be, to some extent, at risk'.⁸⁶ The 'family' which is protected under this Act, however, is defined in very narrow terms, since only spouses are included.

Scotland

In Scotland, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 provides a deep protection for spouses against third party dealings involving the matrimonial home. The Scottish legislation confers rights of occupation in the matrimonial home on non-entitled spouses. Although the nature of the right conferred is similar to the 'matrimonial home rights' conferred on non-entitled spouses in England and Wales,⁸⁷ and in Northern Ireland,⁸⁸ the major distinguishing feature of the Scottish legislation is that the non-owning spouse's right of occupation affects third parties without need for registration.⁸⁹ The Scottish legislation proceeded on the basis that: 'it seems sensible and appropriate to have a wider-ranging provision, which will give a high level of protection to the vast majority of spouses, whether or not they have at an earlier date, when the marriage was working quite successfully, anticipated the problems that might arise in the event of marital breakdown'.⁹⁰

The Scottish legislation operates in a different way to the Irish Family Home Protection Act 1976, which renders unilateral dealings concerning the matrimonial home which are executed without the consent of the non-transacting spouse void. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 does not render void dealings in fraud of occupancy rights. Instead, the Scottish Act ensures that the non-entitled spouse's occupancy rights are preserved by providing that they can continue to be exercised after the dealing, so that the third party who acquires the home or an interest in it is not entitled to occupy it.

The dimensions of the Scottish provisions, which provide a deep protection for the family home against a narrow category of spouses, are similar to those adopted in Ireland. In both cases, the non-entitled spouse is protected, not by ownership, but by the statutory conferral of rights of control over dealings concerning the matrimonial home.⁹¹ These management rights confer a significant degree of control on non-owning spouses over dealings involving the family home with third parties. However, in Scotland, as in Ireland, they are generally confined to the narrow category of spouses.

⁸⁴ Mr Andrews queried the likelihood that: 'the building societies or other lending agencies will advance money on such a title', *ibid.* It was suggested that: 'money is difficult enough to obtain at present for house purchases for persons intending to marry without adding retrospectively this substantial difficulty and making the procuring of an advance of moneys infinitely more difficult', *ibid.* col 85.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Family Law Act 1996, ss 30–31.

⁸⁸ Family Homes and Domestic Violence (Northern Ireland) Order 1998 (SI 1998/1071), arts 4–6.

⁸⁹ The arguments against the registration requirement as made in the House of Commons are familiar: 'it is unlikely that other than a relatively small minority of spouses would have taken advantage of such an opportunity [to register], because of an unawareness of the opportunities existing under the law, but, more importantly, because spouses are unlikely to conceive of the need for such precautions as long as the marriage is working well. By the time the marriage has broken down, it might be too late to start thinking in terms of lodging a matrimonial notice', *Hansard*, HC Deb, First Scottish Standing Committee, col 101 (16 June 1981), Mr Rifkind.

⁹⁰ *Ibid.*

⁹¹ Although cohabitants have no automatic rights under the 1981 Act, they can apply to the court for a grant of occupancy rights for a period of up to 6 months, which can be extended by subsequent periods of up to 6 months: Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 18.

New Zealand – Joint Family Homes Act 1964

It was noted above⁹² that family property in New Zealand is governed by a two-tier system. The matrimonial property regime, as discussed above, provides a wide but shallow protection to spouses and cohabitants, including same-sex cohabitants. In sharp contrast to this, however, is the narrow but deep protection conferred on spouses by the Joint Family Homes Act 1964.⁹³ Whereas the matrimonial property legislation, like the *de facto* relationships regimes in Canada and Australia, was targeted at addressing property issues arising in circumstances of relationship breakdown and death, the joint family homes system was primarily intended to protect the family home against the claims of third party creditors.

The joint family homes system operates by way of an opt-in scheme of statutory co-ownership between spouses. The effect of the provisions is not automatic, but depends on registration of a property as a joint family home. Since the Joint Family Homes Act 1964 provides for statutory co-ownership *during* the marriage, however, there are obvious implications for third parties. In addition to joint legal and beneficial ownership, a number of consequences flow from registration,⁹⁴ including the protection of a non-transacting spouse against unilateral disposition of the property, and a degree of immunity against the claims of creditors. The Joint Family Homes Act 1964 provides that a 'specified sum',⁹⁵ an amount of money representing a portion of the equity in the home, is protected for the spouses against the claims of creditors. Remaining equity in the property: 'enjoys qualified protection in that the Court has a discretion as to its availability to creditors'.⁹⁶

The registration of family property as a joint family home gives rise to deep and substantial protections, both between the partners *inter se*,⁹⁷ and against creditors. These protections are narrowly limited in their application, however, due to the registration requirement, and the limitation of the option to register to spouses. Statistical evidence indicates that the number of homes registered under the Joint Family Homes Act 1964 declined over the 1970s and 1980s, and is now small when compared to the total number of homes it could cover.⁹⁸ In 1996–1997, 2,563 applications were lodged with the Land Register, and in 1997–1998, 2,165 applications were made. While these figures do not incorporate the net change to the total number of homes covered by the Act, some sense of proportion can be gleaned from the fact that in 1996 there were 860,063 private dwellings in New Zealand (although not all of these could be registered as joint family homes).⁹⁹ It is likely, however, that the reduction in the use of the Joint Family Homes Act 1964 is attributable in part to reliance on the secondary layer of protection conferred on spouses by the Matrimonial Property Act 1976.¹⁰⁰ Although the protection conferred by the matrimonial property regime is much shallower than that offered by registration under the joint family homes legislation, the matrimonial property regime is available to a much wider category of individuals.

⁹² See p 10 above 'New Zealand – Matrimonial Property Act 1976', and nn 58–69 and associated text.

⁹³ Which replaced and re-enacted the original Joint Family Homes Act 1950.

⁹⁴ The spouses become legal and beneficial joint tenants, and acquire joint and several liability for debts and charges on the property. They have equal rights to possession, use and enjoyment of the land, and, as joint tenants, have the right of survivorship against one another, and are exempt from estate duty. See further, R. L. Fisher, *op cit*, n 59, at para 7.8.

⁹⁵ As from 1 August 1996, the specified sum was set at \$82,000, Joint Family Homes (Specified Sum) Order 1996 (SR 1996/175).

⁹⁶ The courts endorsed the policy objectives of the Act when exercising this discretion. In *Pannell v Pannell et Ux*, [1966] NZLR 324, the court held that: '[t]he policy of the Joint Family Homes Act 1964 is that, except in special circumstances, a joint family home settled under the Act shall be preserved for the benefit of the registered proprietors and their family'. In *Sutherland v Sutherland*, Turner J stated that: '[t]he Act, in a word, appears to contemplate the assurance and continuity to the home which is so registered'. [1955] NZLR 689, at p 691. See also *Fairmaid v Otago District Land Register* [1952] NZLR 782; and *Henson v Henson* [1958] NZLR 684. See also R. L. Fisher, *op cit*, n 59, at para 7.13.

⁹⁷ Settlement under the Act conferred on spouses an immediate joint interest at law and in equity.

⁹⁸ See M. Appleby, 'The Joint Family Homes Act – its usefulness outlined' (1977) *New Zealand Law Journal* 512, for disadvantages of registering property as a joint family home.

⁹⁹ Statistics from Land Information New Zealand.

¹⁰⁰ Discussed above under 'New Zealand – Matrimonial Property Act 1976'.

Canadian homestead-type legislation

In addition to the wide but shallow family property policies adopted by the *de facto* relationship legislation and the doctrine of unjust enrichment,¹⁰¹ some Canadian provinces have also adopted homestead-type provisions, which confer substantial powers of management on a narrow range of partners. These provisions are of similar effect to the narrow but deep policies adopted in Ireland and Scotland, and discussed above. In Ontario, British Columbia, Alberta, Manitoba, New Brunswick, Prince Edward Island, Nova Scotia, Quebec and Newfoundland, legislation confers rights on spouses to prevent unilateral dispositions of the family home without the consent of a non-transacting spouse.

In Ontario, section 21 of the Family Law Act 1986 provides that no spouse shall dispose of or encumber an interest in a matrimonial home unilaterally without the consent of the non-transacting spouse. In British Columbia, the Land (Spouse Protection) Act 1996 confers deep rights protecting the matrimonial home against unilateral sale but is dependent on registration, and narrowly confined to spouses. The Dower Act 2000 in Alberta, the Homesteads Act 1992 in Manitoba, the Marital Property Act 1980 in New Brunswick, the Family Law Act 1995 in Prince Edward Island, and the Quebec Civil Code all provide similarly deep protections against dealings with third parties involving the family home. These homestead-type provisions are, however, all narrowly restricted to spouses.

In Nova Scotia, the Matrimonial Property Act 1989 originally enabled spouses only to exercise control over dispositions involving the matrimonial home. This provision was widened, however, following the decision in *Walsh v Bona*.¹⁰² The current policy position in Nova Scotia has shifted following this challenge in the Canadian Supreme Court, and the Nova Scotia legislature has extended the provisions of the Matrimonial Property Act 1989 by the enactment of the Law Reform Act 2000 to include heterosexual and homosexual cohabitants. This legislation, which enables a wider range of partners to exercise management control over the family home against third parties, represents an exception to the usual wide but shallow *or* narrow but deep dichotomy. It is noteworthy, however, that it remains necessary for non-spouses to register a 'domestic partnership declaration' before coming within the remit of the protections of this legislation.

Another example of the narrow but deep paradigm is provided by the Family Law Act 1990, which governs matrimonial property law in Newfoundland. This legislation provides for automatic statutory co-ownership between spouses.¹⁰³ This legislation ensures that spouses acquire deep and substantial co-ownership rights in the family home. It is noteworthy, however, that this deep protection is available only on narrow grounds, that is, between spouses. The Newfoundland legislation also provides homestead rights,¹⁰⁴ but again these rights are limited to spouses.

General trust principles in Australia

Another example of a family property policy which is (quite) narrow but (quite) deep is the application of general trust principles in Australia. Although the Australian courts have moved beyond the traditional common intention constructive trust and towards a broader concept of 'unconscionability',¹⁰⁵ the criteria governing the acquisition of interests in the family home in Australia have remained relatively restrictive. The Australian courts appear willing to: 'give full recognition to the flexible way in which couples arrange their financial commitments

¹⁰¹ Discussed above.

¹⁰² (2000) ACWS (3d) 287.

¹⁰³ Section 8(1) of the Family Law Act 1990 provides that: 'Notwithstanding the manner in which the matrimonial home is held by either or both of the spouses, each spouse has a ½ interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has'. Section 8(2) provides that the joint tenancy is conferred automatically.

¹⁰⁴ Family Law Act 1990, s 10.

¹⁰⁵ *Muschinski v Dodds* [1985] 160 CLR 583; and *Baumgartner v Baumgartner* [1987] 164 CLR 137.

including those to mortgage repayments, renovations and general household expenses'.¹⁰⁶ Indirect forms of financial contribution 'for money's worth', such as unpaid work in the partner's business,¹⁰⁷ and labour towards construction or improvements on the property¹⁰⁸ have been accepted by the courts as relevant when considering unconscionability.

Nevertheless, although Gaudron J reasoned in *Baumgartner v Baumgartner*¹⁰⁹ that: 'in the context of domestic relationships, it is relevant to inquire whether the asset was acquired for the purpose of the relationship, and whether non-financial contributions should be taken into account'¹¹⁰ the lower courts have remained ambivalent about attaching value to non-financial contributions and, in subsequent cases, the notion of 'pooling their resources' has been confined to direct and indirect financial contributions.¹¹¹ Financial contributions (direct or indirect) are thus generally necessary,¹¹² along with circumstances indicating: 'the unconscionable attempt by the title-holder to retain the benefits of the other party's contribution to the relationship'.¹¹³ Although labour in the home has been taken into account when combined with money or money's worth, it has not in itself sufficed to form the basis of a claim under the Australian doctrine. The Australian courts continue to value financial contributions more highly than non-financial or labour contributions and, in fact, it is not clear that non-financial contributions are recognised at all.¹¹⁴

Regarding the depth of the doctrine, there was some initial uncertainty in the Australian courts as to whether existing third party interests could be affected by a beneficial interest acquired under the 'unconscionability' principle. In *Muschinski v Dodds*,¹¹⁵ Deane J declined to offer a final view on the issue of retrospectivity, suggesting instead that the issue could be dealt with on the facts of each case. On the facts of *Muschinski v Dodds*, Deane J concluded that: 'lest the legitimate claims of third parties be adversely affected, the constructive trust should be imposed only from the date of publication of reasons for judgment of this Court'.¹¹⁶ It has since been held, however, that the Australian doctrine produces a substantive result, giving rise to a constructive trust which confers proprietary rights, and is retrospective in effect.¹¹⁷ Third party claims arising between the date of contributions and the date of the court order may, therefore, be affected by the interest acquired under this trust. The interest acquired by a claimant under this doctrine is thus relatively deep in proprietary terms. It is noteworthy, however, that the criteria for establishing such an interest are relatively restrictive. Although both direct and indirect financial contributions may be taken into account by the court, labour in the home and childcare have not in themselves sufficed to form the basis of a claim under the Australian doctrine.

¹⁰⁶ R. Bailey-Harris, 'Financial Rights in Relationships outside Marriage: A Decade of Reforms in Australia' (1995) 9 *International Journal of Law and the Family* 233, at p 238; see also *Hibberson v George* (1989) 12 Fam LR 725; *Miller v Sutherland* (1990) 14 Fam LR 416; *Bennett v Taurua* (1992) 15 Fam LR 317; *Ammala v Sarimaa* (1992) 15 Fam LR 563; and *Stone v Hallam* (1992) DFC 95.

¹⁰⁷ *Lapman v Lapman* (1989) Fam LR 1.

¹⁰⁸ *Miller v Sutherland* (1990) 14 Fam LR 416.

¹⁰⁹ Op cit, n 105.

¹¹⁰ Ibid, at p 156.

¹¹¹ It is noteworthy that the cases which endorsed the idea of attaching value to non-financial contributions generally involved financial contributions also. This approach is similar to that taken by the English Court of Appeal in *Midland Bank Ltd v Cooke and Another*, op cit, n 13.

¹¹² In *Baumgartner v Baumgartner*, op cit, n 105, the High Court appeared willing to take account of the wife's labour in the home, however, her interest was primarily calculated on the basis of her financial contributions to the family pool.

¹¹³ H. A. Finlay et al, *Family Law in Australia* (Butterworths, 5th edn, 1997), at para 6.84.

¹¹⁴ See also the decision in *Brvson v Brvant* (1992) 29 NSWLR 188.

¹¹⁵ Op cit, n 105.

¹¹⁶ Ibid, at p 623.

¹¹⁷ See *Ikeuchi v Liu* (2001) 160 FLR 94; *Parsons and Parsons v McBain* [2001] FCA 376; *Giumelli v Giumelli* (1999) 196 CLR 101; *Re Osborn* (1989) 25 FCR 547; and compare *Re Sabri* (1996) 21 Fam LR.

CONCLUSIONS

The reform of family property law is indeed a tough nut to crack. Policy makers in the field of family property must deal, not only with the major social policy issues raised by 'family', but also with the property dimension of family homes, including, for example, the need to ensure the marketability of the property by enabling secure transactions to take place. This analysis of family property policies, emanating both from within these islands and from the main common law jurisdictions in the Commonwealth, reveals that, in each jurisdiction, a balance has been struck between the family interest and the commercial claims of third parties. Although the policies adopted across these jurisdictions vary considerably, it is submitted that the dimensions of each system display common features. The width of each scheme, that is, the range of persons embraced by the family property policy, is inversely proportionate to the depth of proprietary protection conferred on the claimant, during the relationship, against third parties.

The Law Commission's recent Discussion Paper attempted to design a system for family property which would be both wide in remit, and deep in proprietary effect. Although this uncompromising attitude may be socially laudable, it is submitted that the task set for itself by the Commission was overly ambitious, and consequently impossible to achieve. The result has been much discussion without the formulation of any – even provisional – policy. All of the policies adopted in the various jurisdictions considered in this article have struck a compromise somewhere between width of applicability and depth of proprietary protection in their family property provisions. It is noteworthy, however, that some jurisdictions have relieved the tensions between family and property interests to a certain extent by adopting a few alternative provisions, which provide family property protection in different layers.¹¹⁸

It is suggested that this type of 'tiered' approach might present a suitable way forward for the reform of family property law in England and Wales.¹¹⁹ There is a clue to the potential of this approach as a possible way forward in Part V of *Sharing Homes*.¹²⁰ It is submitted that this avenue should be further explored, and that a tiered approach would make it easier for a reform body to get to grips with the contemporary dimensions of family property. One of the advantages of a 'tiered' approach, as opposed to the 'one-stop shop' which the Law Commission was striving towards in *Sharing Homes*, would be that while some protection could be conferred on a wide range of home sharers, the depth of that protection could be tailored to suit different needs. A scheme for family property might include, as one layer, a deep protection for a relatively narrow group of home sharers,¹²¹ supplemented by another layer of wider but shallower provisions.

A layered approach would also enable particular policies adopted in respect of different types of home sharers to reflect their specific needs. Although ownership might present an appropriate solution in some contexts, it might also be worth considering whether the needs of some types of home sharers would be better served by security of tenure, rather than ownership, or by control over dealings affecting the family home.¹²² Alternatively, for others, it might be more appropriate to obtain a money charge against the property by way of financial

¹¹⁸ See, for example, the contrast between the wide but shallow *de facto* provisions in some Canadian provinces, and their narrow but deep homestead protections; the contrast between wide but shallow *de facto* provisions and narrower but deeper common law principle in Australia; the wide but shallow matrimonial property provisions, and the narrow but deep joint family homes legislation in New Zealand.

¹¹⁹ A tiered approach is also adopted in proposals currently under consideration in Northern Ireland (Law Reform Advisory Committee (Northern Ireland), *Matrimonial Property*, Final Report (LRAC (NI) No 8 (2000))).

¹²⁰ *Op cit*, n 1, at para 5.42.

¹²¹ Although, as the Law Commission has recently argued, any definition raises significant questions of social policy, it is useful to recall the argument made by R. Bailey-Harris, that the difficulties raised by these issues should not be used as an excuse for inaction: 'how to define the relevant relationship outside of marriage? The alleged difficulty of this has often been invoked as the excuse for legislative inaction. However, it should not be allowed to daunt us, because the problems are not insuperable', R. Bailey-Harris, 'Third Stonewall Lecture – Lesbian and Gay Family Values and the Law' [1999] *Fam Law* 560.

¹²² In some cases, what the home sharer really needs and values is the right to remain in occupation of the property, and to continue to use it as a home.

compensation.¹²³ These are merely a few of the possibilities. It is suggested, however, that the overall advantage of a tiered approach would be to confer varying rights of suitable depth on a wide range of home sharers. Although any compromise on depth of protection as a *quid pro quo* for wider applicability would amount to something less than the Law Commission hoped to achieve, if family property policy in England and Wales is to move forwards, this may be a compromise which simply has to be made.

¹²³ The idea of thinking functionally about property rights in the family home, rather than focusing exclusively on ownership, is suggested by J. Dewar, 'Land, Law and the Family Home', in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998).